

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

ANGELA A. and WILLIAM M. DEFORD,
Plaintiffs,
v.
JUDGE EDWARD JOHNSON, et. al.,
Defendants.

Case No. 3:17-cv-00695-RCJ-WGC

**REPORT & RECOMMENDATION OF
U.S. MAGISTRATE JUDGE**

This Report and Recommendation is made to the Honorable Robert C. Jones, Senior United States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and the Local Rules of Practice, LR 1B 1-4.

Before the court is Plaintiffs' Application to Proceed in Forma Pauperis (IFP) (ECF No. 1) and pro se Complaint (ECF No. 1-1).

I. IFP APPLICATION

A person may be granted permission to proceed IFP if the person "submits an affidavit that includes a statement of all assets such [person] possesses [and] that the person is unable to pay such fees or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that the person is entitled to redress." 28 U.S.C. § 1915(a)(1); *Lopez v. Smith*, 203 F.3d 1122, 1129 (9th Cir. 2000) (en banc) (stating that 28 U.S.C. § 1915 applies to all actions filed IFP, not just prisoner actions).

In addition, the Local Rules of Practice for the District of Nevada provide: "Any person who is unable to prepay the fees in a civil case may apply to the court for authority to proceed [IFP]. The application must be made on the form provided by the court and must include a financial affidavit disclosing the applicant's income, assets, expenses, and liabilities." LSR 1-1.

""[T]he supporting affidavits [must] state the facts as to [the] affiant's poverty with some

1 particularity, definiteness and certainty.” *U.S. v. McQuade*, 647 F.2d 938, 940 (9th Cir. 1981)
 2 (quoting *Jefferson v. United States*, 277 F.2d 723, 725 (9th Cir. 1960)). A litigant need not “be
 3 absolutely destitute to enjoy the benefits of the statute.” *Adkins v. E.I. Du Pont de Nemours & Co.*,
 4 335 U.S. 331, 339 (1948).

5 A review of the application to proceed IFP reveals Plaintiffs cannot pay the filing fee;
 6 therefore, the application should be granted.

7 **II. SCREENING**

8 **A. Standard**

9 “The court shall dismiss the case at any time if the court determines that ... the action or
 10 appeal (i) is frivolous or malicious; (ii) fails to state a claim upon which relief may be granted; or
 11 (iii) seeks monetary relief against a defendant who is immune from such relief.” 28 U.S.C. §
 12 1915(e)(2)(B)(i)-(iii). This provision applies to all actions filed IFP, whether or not the plaintiff is
 13 incarcerated. *See Lopez*, 203 F.3d at 1129; *see also Calhoun v. Stahl*, 254 F.3d 845 (9th Cir. 2001)
 14 (per curiam).

15 Dismissal of a complaint for failure to state a claim upon which relief may be granted is
 16 provided for in Federal Rule of Civil Procedure 12(b)(6), and 28 U.S.C. § 1915(e)(2)(B)(ii) tracks
 17 that language. Thus, when reviewing the adequacy of a complaint under 28 U.S.C. §
 18 1915(e)(2)(B)(ii), the court applies the same standard as is applied under Rule 12(b)(6). *See*
 19 *Watson v. Carter*, 668 F.3d 1108, 1112 (9th Cir. 2012) (“The standard for determining whether a
 20 plaintiff has failed to state a claim upon which relief can be granted under § 1915(e)(2)(B)(ii) is
 21 the same as the Federal Rule of Civil Procedure 12(b)(6) standard for failure to state a claim.”).
 22 Review under 12(b)(6) is essentially a ruling on a question of law. *See Chappel v. Lab. Corp. of*
 23 *America*, 232 F.3d 719, 723 (9th Cir. 2000) (citation omitted).

24 In reviewing the complaint under this standard, the court must accept as true the
 25 allegations, construe the pleadings in the light most favorable to the plaintiff, and resolve all doubts
 26 in the plaintiff’s favor. *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969) (citations omitted).
 27 Allegations in pro se complaints are “held to less stringent standards than formal pleadings drafted
 28 by lawyers[.]” *Hughes v. Rowe*, 449 U.S. 5, 9 (1980) (internal quotation marks and citation

1 omitted).

2 A complaint must contain more than a “formulaic recitation of the elements of a cause of
3 action,” it must contain factual allegations sufficient to “raise a right to relief above the speculative
4 level.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). “The pleading must contain
5 something more ... than ... a statement of facts that merely creates a suspicion [of] a legally
6 cognizable right of action.” *Id.* (quoting 5 C. Wright & A. Miller, *Federal Practice & Procedure* §
7 1216, at 235-36 (3d ed. 2004)). At a minimum, a plaintiff should state “enough facts to state a
8 claim to relief that is plausible on its face.” *Id.* at 570; *see also Ashcroft v. Iqbal*, 556 U.S. 662,
9 678 (2009).

10 A dismissal should not be without leave to amend unless it is clear from the face of the
11 complaint that the action is frivolous and could not be amended to state a federal claim, or the
12 district court lacks subject matter jurisdiction over the action. *See Cato v. United States*, 70 F.3d
13 1103, 1106 (9th Cir. 1995); *O’Loughlin v. Doe*, 920 F.2d 614, 616 (9th Cir. 1990).

14 **B. Plaintiffs’ Complaint**

15 The caption of the complaint name both Judge Edward Johnson and Lyon County;
16 however, the body of the complaint lists only Edward Johnson and the allegations only pertain to
17 Judge Edward Johnson. In short, Plaintiffs take issue with proceedings held before Judge Edward
18 Johnson. They claim that Judge Johnson violated Judicial Canons which includes the duty to be
19 respectful and engaged in behavior that could be construed as harassing, prejudicial or biased.
20 They claim that Judge Johnson violated their right to be heard under the Fourteenth Amendment
21 because they were not allowed to call or cross-examine witnesses.

22 Judges are entitled to absolute judicial immunity for acts performed in their official
23 capacity, as Plaintiffs have alleged here. *See In re Castillo*, 297 F.3d 940, 947 (9th Cir. 2002)
24 (judicial immunity is “a ‘sweeping form of immunity’ for acts performed by judges that relate to
25 the ‘judicial process.’” “This absolute immunity insulates judges from charges of erroneous acts
26 or irregular action, even when it is alleged that such action was driven by malicious or corrupt
27 motives, ... or when the exercise of judicial authority is ‘flawed by the commission of grave
28 procedural errors.’”) (citations omitted); *see also Ashelman v. Pope*, 793 F.2d 1072, 1075 (9th Cir.

1 1986) (en banc); *Moore v. Brewster*, 96 F.3d 1240, 1243 (9th Cir. 1996) (“The judicial or quasi-
2 judicial immunity available to federal officers is not limited to immunity from damages, but
3 extends to actions for declaratory, injunctive and other equitable relief.”). There are no substantive
4 allegations against Lyon County, and instead it appears that the allegations only center around
5 Judge Johnson’s alleged conduct.

6 As a result, Plaintiff fails to state a claim upon which relief may be granted, and this action
7 should be dismissed with prejudice.

8 **III. RECOMMENDATION**

9 IT IS HEREBY RECOMMENDED that the District Judge enter an order:

10 (1) **GRANTING** Plaintiffs’ IFP application (ECF No. 1). Plaintiffs are permitted to
11 maintain this action without the necessity of prepayment of fees or costs or the giving of security
12 therefor. This order granting IFP status does not extend to the issuance of subpoenas at government
13 expense.

14 (2) Directing the Clerk to **FILE** the complaint (ECF No. 1-1); and

15 (3) **DISMISSING** the complaint **WITH PREJUDICE** for failing to state a claim upon
16 which relief may be granted.

17 Plaintiffs should be aware of the following:

18 1. That they may file, pursuant to 28 U.S.C. § 636(b)(1)(C), specific written objections to
19 this Report and Recommendation within fourteen days of receipt. These objections should be titled
20 "Objections to Magistrate Judge's Report and Recommendation" and should be accompanied by
21 points and authorities for consideration by the district judge.

22 2. That this Report and Recommendation is not an appealable order and that any notice of
23 appeal pursuant to Rule 4(a)(1) of the Federal Rules of Appellate Procedure should not be filed
24 until entry of judgment by the district court.

25 DATED: January 30, 2018.

26 
27 WILLIAM G. COBB
28 UNITED STATES MAGISTRATE JUDGE